84-266

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH VENNERI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court erred in instructing the jury that use of the mails to deprive an employer of the faithful services of its employee and to deprive competitors of a fair opportunity to compete violates the mail-fraud statute.

1. Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and sentenced to two years' imprisonment, 18 months of which was suspended in favor of two years' probation. Petitioner was also fined $1000 and ordered to make restitution of $3512. The court of appeals affirmed (Pet. App. A1-A5).

The evidence at trial, the sufficiency of which is not in dispute, showed that petitioner and two co-conspirators bribed Frederick M. Taylor with a $7,000 grand piano in order to obtain favorable treatment with respect to the glass and glazing work on a Marriott hotel.[1] Taylor was Marriott's project manager for construction of the hotel. He arranged for petitioner and his associates to meet with the general contractor and Mid-South, the subcontractor who had submitted the lowest preliminary bid on the glass work, introducing the conspirators as consultants rather than as competing subcontractors. Petitioner was therefore able at this meeting to learn Mid-South's bid on the work. Subsequently, after the time for submitting final bids had closed, petitioner submitted a bid through Taylor that was $40,000 less than Mid-South's. Taylor convinced the general contractor to accept petitioner's bid. Because the bid was out of time, the savings were not reflected in the general contractor's bid and therefore were realized by the general contractor rather than by Marriott. Pet. App. A2; C.A. App. 45, 73-78, 98-101, 110-113, 130-139, 141.

2. Petitioner contends that the district court's instructions erroneously allowed the jury to convict on the basis of his bribe of Taylor without proof of economic loss or business risk to Marriott (Pet. 5-8) and on the basis of fraud with respect to Mid-South, the competing subcontractor (Pet. 8-10). These contentions, as well as his claim that the decision of the court of appeals conflicts with decisions from other circuits, are without merit.

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[1]Petitioner's co-conspirator Aaron Strauss testified at trial pursuant to a no-prosecution agreement. Co-conspirator Denny Stam, who was tried with petitioner, pleaded guilty to one count of mail fraud midway through the trial. Three invoices for the piano constituted the mailings charged in the indictment.

a. The courts of appeals have uniformly held that the mail-fraud statute extends to breaches of duty like that involved here, and this Court has consistently declined to review those decisions.[2] The offense may be established by proof that the defendant defrauded his victims of their employees' honest, faithful and loyal services, which occurs at least where the employee has misrepresented or failed to disclose material information when he was under a duty to do so.

Petitioner seizes on one portion of the instructions, which charged the jury (C.A. App. 293) that Marriott had a right to Taylor's faithful and loyal performance of his duties and that deprivation of that right may constitute a scheme to defraud within the meaning of 18 U.S.C. 1341. This, he contends (Pet. 7), allowed the jury to convict simply on the government's proof that Taylor violated a duty to disclose his receipt of the piano to Marriott, without proof of its materiality. But the jury was also instructed that Taylor had a duty to disclose to his employer "facts known to him

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[2]See, *e.g.*, *United States* v. *Feldman*, 711 F.2d 758, 763 (7th Cir.), cert. denied, No. 83-509 (Oct. 31, 1983); *United States* v. *Bronston*, 658 F.2d 920, 926 (2d Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States* v. *Shamy*, 656 F.2d 951, 957 (4th Cir. 1981), cert. denied, 455 U.S. 939 (1982); *United States* v. *Barta*, 635 F.2d 999 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Mandel*, 591 F.2d 1347, 1361-1364, vacated on other grounds, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States* v. *Castor*, 558 F.2d 379, 383 (7th Cir. 1977), cert. denied, 434 U.S. 1010 (1978); *United States* v. *Bush*, 522 F.2d 641, 646-648 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976); *United States* v. *Keane*, 522 F.2d 534, 544-546 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976); *United States* v. *States*, 488 F.2d 761 (8th Cir. 1973), cert. denied, 417 U.S. 909 (1974); *United States* v. *George*, 477 F.2d 508 (7th Cir.), cert. denied, 414 U.S. 827 (1973).

which he had reason to believe were *material to the decisions of the Marriott Corporation*"; that "the government must prove beyond a reasonable doubt that *some actual harm or injury to the Marriott Corporation was contemplated* " by petitioner; that petitioner must have intended to "cause[] some financial or other loss to another or [to] bring[] about some financial or other gain to [himself] or others"; and that "proof of *actual injury* to the victim" was required (C.A. App. 294-298; emphasis added). Taken as a whole, the instructions made it clear that petitioner could be convicted only upon a showing that Taylor's failure to disclose the bribe to Marriott was material to the corporation's business decisions or on a showing that Marriott suffered some other sort of direct harm.

These instructions surely did not constitute plain error, as they must for petitioner to prevail in light of his failure to object at trial (Pet. App. A3). There is no conflict with the decisions cited by petitioner (Pet. 7), which require only that any nondisclosure be material, something also required here. See *United States* v. *Lemire,* 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983); *United States* v. *Feldman,* 711 F.2d 758, 763 (7th Cir.), cert. denied, No. 83-509 (Oct. 31, 1983); *United States* v. *Bethea,* 672 F.2d 407, 414 (5th Cir. 1982); *United States* v. *Ballard,* 663 F.2d 534, 540-541 (1981), modified on denial of reh'g, 680 F.2d 352, 353 (5th Cir. 1982). Indeed, the instructions given here were almost identical to those given in *Lemire,* which were extensively analyzed by that court and found not to require reversal (720 F.2d at 1339-1341). Even if the instructions might be questioned, there was surely no prejudice to petitioner in light of the clear proof that Marriott did suffer actual loss and that nondisclosure of the bribe was material.[3] Under these

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[3]Petitioner's scheme caused Marriott to lose an opportunity to realize the $40,000 in savings resulting from petitioner's lower bid because, with Taylor's help, the bid was submitted after the time during which

circumstances, review is unwarranted. See generally *United States* v. *Frady*, 456 U.S. 152, 163 & n.14 (1982); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977); Fed. R. Crim. P. 30, 52(b).

b. Petitioner also contends (Pet. 8-10) that he could not be convicted of defrauding potential competitors of a fair opportunity to compete because he had no duty toward them. But by misrepresenting himself as a consultant rather than a competitor and thereby learning of Mid-South's bid, and by gaining an opportunity to submit a lower bid after the deadline had passed, petitioner deprived his competitor of the right to have its bid judged fairly on the merits. Such conduct has consistently been held to be within the mail-fraud statute. See, *e.g.*, *United States* v. *Castor*, 558 F.2d 379, 383-384 (7th Cir. 1977) (scheme aimed at reducing competitors' opportunity to compete), cert. denied, 434 U.S. 1010 (1978); *Gregory* v. *United States*, 253 F.2d 104 (5th Cir. 1958) (same); see also, *e.g.*, *Durland* v. *United States*, 161 U.S. 306 (1896) (predecessor statute not limited

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the savings would have accrued to Marriott. Moreover, it strains credulity to suggest that the bribe was not material: surely Marriott would have wanted to know that its project manager, who had responsibility for overseeing the work done on the hotel, had taken a substantial bribe from one of the subcontractors (see C.A. App. 80-82). The court's observations in *United States* v. *Bronston*, 658 F.2d at 929, are equally applicable here:

> Although a hypothetical can be posed in which one could be prosecuted for mail fraud on the basis of a breach of fiduciary duty accompanied by little more than a failure to disclose the breach to the person to whom the duty was owed, without any prospect of substantial economic harm to the victim, this is not such a case. Here we are faced with a straight-forward economic fraud * * *.

See also *United States* v. *George*, 477 F.2d at 512 (purchasing agent harmed employer by giving preferential treatment to one supplier over others).

to common-law fraud); *United States* v. *Mandel*, 591 F.2d 1347, 1361, aff'd in relevant part, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980) (mail-fraud statute applies to any "scheme involving deception that employs the mails in its execution that is contrary to public policy and conflicts with accepted standards of moral uprightness, fundamental honesty, fair play and right dealing").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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